

Energy and Telecommunications Interim Committee
August 19, 2020

Dear Chairman Skees and Members of the Committee:

We are writing in follow up to our public comments provided to the Committee regarding utility crossings of railroad property. In addition to the comments conveyed at the last meeting we have since reviewed what is entitled the "Co-op Draft Proposal" found on the Committee's website. The intent of this effort is simply an attempt to have the Legislature take one entity's private property for the use of another without just compensation, and regardless of any safety issues for railroad workers, those traveling on the rail lines, nearby residents, utility employees and contractors. While there are other technical and operations problems with the Proposal, the Committee should be aware that the Proposal comes with significant legal issues under State and U.S. Constitutions, as well as the federal Interstate Commerce Commission Termination Act ("ICCTA").

The Committee should be aware that the Proposal violates the Montana and U.S. Constitutions. It is well established that private property owners are entitled to just compensation for any taking of property. A taking of property happens when there's a permanent physical occupation of property, no matter how minimal the impact on the owner. The physical occupation of a railroad right-of-way by a utility, as contemplated in this Proposal, is a taking under both the Montana and United States Constitutions.

The Proposal violates established U.S. Supreme Court precedent by establishing a one-time payment of \$750 for any crossing of railroad right of way by a utility and allowing no fee for crossing other railroad owned property. In addition, it designates a new type of property defined as "Disused Rail Crossings" which appears to ignore the fact that the property is still private property. It also establishes arbitrary deadlines, placing the burden and expense on the railroad, and imposes an arbitration process. This attempt to set compensation for any physical occupation of railroad property and to place the sole burden on railroads to prove entitlement to additional compensation is unlawful. See *Monongahela Nav. Co. v. U. S.*, 148 U.S. 312 (1893).

The Proposal also deprives railroads of their constitutionally guaranteed right to recover litigation expenses for takings of their property. Article II, Section 29 of the Montana Constitution specifically provides that "[i]n the event of litigation [related to a taking], just compensation shall include necessary expenses of litigation to be awarded by the court when the private property owner prevails." MONT. CONST. art. II, § 29. It also violates the equal protection clause. Equal Protection Clause - MONT. CONST. art. II, § 4 ("No person shall be denied the equal protection of the laws.")

In addition to depriving railroads of their right (1) to seek just compensation for a taking of their property and (2) to recoup their constitutionally-guaranteed litigation expenses, this draft Proposal unconstitutionally allows quick takes of railroad property and excludes railroads from asserting their due process rights available to all other landowners under well-established eminent domain law in violation of the Montana Constitution. The Montana Constitution requires that no taking can occur without "just compensation to the full extent of the loss having been first made to or paid into court for the owner." MONT. CONST. Art. II, § 29. Contrary to the Constitution, the Proposal would allow utilities to "quick take" and begin construction on railroad property within 30 days after filing its application and paying a

railroad only \$750. This violates MONT. CONST. art. II, § 29 as well as Montana eminent domain law, which makes “quick takes” an exception to the rule and subject to the condemnor seeking an interlocutory order from a district court and depositing the full amount of just compensation claimed by the property owner. *See* Mont. Code Ann. § 70-30-311; *City of Missoula v. Mountain Water Co.*, 417 P.3d 321, 325 (Mont. 2018). The Montana Constitution recognizes that the right to possess and protect property is inalienable, and thus entitled to the highest level of constitutional protection. MONT. CONST. art. II, § 3 (“[I]nalienable rights include the right to... possessing and protecting property...”). Further, under Montana law, “[t]he due process clause, in addition to its requirement of public use and just compensation, protects the land owner from the adoption of any form of procedure in eminent domain cases which deprives him of a reasonable opportunity to be heard and so to present such objections and claims as he is entitled to make.” *State ex rel. State Highway Commission v. District Court of the Thirteenth Judicial District*, 499 P.2d 1228, 1234 (Mont. 1972), citing *Housing Authority of City of Butte v. Bjork*, 98 P.2d 324, 326 (Mont. 1940). In addition to allowing unconstitutional “quick takes” of railroad property, this Proposal, if passed, would violate the railroads’ right to due process by depriving the railroads of protections to landowners granted under Montana eminent domain laws.

The Proposal also seeks to create a special law when a general law is already applicable. Article V, Section 12 of the Montana Constitution, provides that “[t]he legislature shall not pass a special or local act when a general act is, or can be made, applicable.” MONT. CONST. art. V, §12. The Proposal is a special law because it only applies to railroads and leaves all other landowners who have property taken by utilities subject to Montana’s eminent domain statute. *See Lowery v. Garfield County*, 208 P.2d 478, 487 (Mont. 1949)

Lastly, the Proposal is likely subject to preemption under the ICCTA. ICCTA grants the Surface Transportation Board exclusive jurisdiction over railroad regulation throughout the United States via its express preemption clause. As noted in the ICCTA, “. . . the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” (49 U.S.C. 10501(b)). In addition, the ICCTA vests in the Surface Transportation Board, exclusive jurisdiction over the “construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks located, or intended to be located, entirely in one State.” (49 U.S.C. 10501(b)).

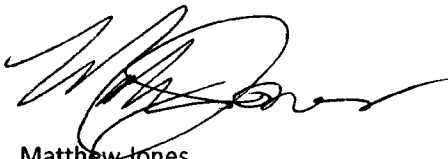
The purpose of ICCTA was to centralize railroad regulation to prevent fragmented legislation state-by-state. Under the Supremacy Clause, state laws that are inconsistent with federal agency or Congressional policy reflected in ICCTA are preempted. ICCTA attempts to regulate property rights, such as adverse possession and condemnation.

Courts in Montana have found that, ICCTA has an express preemption clause, and therefore, ICCTA is intended to completely preempt any other remedies under federal or state law. *See Burlington N. Santa Fe Corp. v. Anderson*, 959 F. Supp. 1288 (D. Mont. 1997).

The preemption issues created by this Proposal are sure to be litigated based upon the numerous portions of the statute that negatively impact railroad operations and safety in Montana. In addition, the Ninth Circuit has also strictly interpreted the ICCTA’s preemption clause. In *City of Auburn v. United States Government*, the court rejected the City of Auburn’s narrow interpretation of the ICCTA in favor of a broad reading of the preemption clause. The court also noted that while the imposition of state or municipal regulations may be for a limited stated purpose, the impacts of such regulations often implicate other areas clearly within the sole jurisdiction of the Surface Transportation Board.

In conclusion, existing Montana eminent domain laws already address all substantive and procedural aspects of a utility's proposed taking of railroad property. These procedures adequately protect railroads and all other owners of private property with guarantees of due process and just compensation, and give the utilities an established path upon which to proceed. If passed into law, the Proposal would certainly face legal challenges due to the constitutional violations created.

Respectfully submitted,



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